SOUTHCOTT *v.* BENNETT.

QUEEN'S BENCH, PASCH. 43 ELIZ. (1601).[1]

[*Same Case*, 4 *Coke*, 83 b.; *Cro. Eliz.* 815.]

If goods are accepted to be kept safely by the bailee, and the goods are stolen, *it seems* that the bailee is liable in detinue to the bailor.

If goods are accepted generally whether the bailee is liable in such a case, *quaere.*

If goods in possession of a bailee are taken or destroyed by a wrongdoer, *it seems* that the bailee is liable in detinue to the bailor, unless he can show that he has exhausted his remedies against the wrongdoer.

If the defendant demurs specially to a replication which is formally defective, *it seems* that he shall have judgment, though the plea be defective in substance; *aliter* if he demurs generally.

SOUTHCOTT brought a writ of detinue against Bennett for certain goods, and declared that he bailed them to the defendant to keep safely, etc. The defendant confessed the bailment, and pleaded in bar that after the bailment one J. S. stole them feloniously out of his possession, etc. The plaintiff replied, and, protesting that said J. S. did not steal said goods, said for plea that he was the defendant's servant retained in his service; and demanded judgment, etc. And thereupon the defendant demurred in law.

Dodderidge for the defendant moved that the plaintiff be barred. And he agreed that in detinue for goods bailed to the defendant it is a good plea that they were stolen by thieves; as is held 8 E. 2, *Detinue* 59; 29 Ass. 28; 9 E. 4, 40 b; 3 H. 7, 4 b; 6 H. 7, 12 a. But those books make a distinction between a general and a special bailment; for if a man bail his goods generally, then if the bailee be robbed he is discharged as to the bailor; but when a man undertakes to keep the goods at his peril he shall be charged, though the goods are stolen from him by thieves. And in our case it was a general bailment, in which case the law will not compel the bailee to be more careful and diligent in the custody of these goods than of his own; wherefore the theft of the goods discharges him. And though the thief was his servant, it is no way material; for no doubt a man may be robbed by his servant as well as by

[1] This report is contained in a volume of manuscript reports of cases in the Queen's Bench, 42–45 Elizabeth, now in the library of the Harvard Law School. It was formerly among the Phillips Manuscripts, No. 7040.

another, and this by the common law as well as by the statute of 21 H. 8. As in 21 H. 7, 14, if a butler who has his master's plate in his care runs away with it, it is felony. Wherefore it seems that the plea in bar is good, and the replication does not avail.

Pynde to the contrary. The bailment here is strong for charging the defendant; for the plaintiff bailed him the goods to keep safely, so he ought to keep them at his peril. And it is not as if he had taken the goods to keep as his own goods, in which case if he had been robbed of them and of his own goods he should be discharged as to the bailor. And it is not all one whether the defendant is robbed by another thief or by his own servant; for when he is robbed by his servant the law imputes default to him, because he should see to his servants. As in 22 H. 6, 22, if a man be lodged in a common inn and bring with him one of his servants or another man who robs him of his goods, the innkeeper shall not be charged. For which reason it was adjudged, 41 Ass. 12, if the sheriff have a man in his custody to return on an exigent, and bail the writ to another, who is robbed by the man who is in custody on the exigent, the sheriff shall be charged for the embezzling of the writ, and shall not be discharged by the robbery, since it was committed by the man in his custody, for it was a default in the sheriff to suffer him to go at large. And so in a case where the defendant has the government and charge of his servants and is robbed by them, this is a default in him which shall not turn to the disadvantage of the plaintiff. Wherefore, etc.

GAWDY, J. *Acc.* This is not a special bailment, whereby the defendant accepts the goods to keep as his own goods, but it is a bailment which charges him to keep them at his peril. And it is no plea in a writ of detinue to say that the defendant was robbed of his goods by such a one; for though a man take goods feloniously, yet there is no doubt that the owner may bring a writ of trespass and recover his damages. Likewise the defendant in this case, though he had no property in the goods, may have an appeal. So that he has a remedy over, to recover the goods or damages for them, if he will pursue it. And this is especially so in this case, for it does not appear in the whole case that the thief was impeached for the felony at the Queen's suit. If that had appeared it would make the case stronger for the plaintiff, since he would have no remedy over for the goods against the felon. And in proof of his opinion he cited 33 H. 6, 1, where this difference is agreed: if the enemies of the king break a prison and let the

prisoners at large, the warden of the prison may discharge himself for the escape; but if the prison be broken by traitors or rebels it is otherwise, because he has a remedy over against them, and it was his fault that he did not guard them more carefully. And so it seems that the bar is not good.

It still remains to see whether the replication is good; for if not, though the bar is otherwise insufficient, since the demurrer is joined on the replication, and the plaintiff's pleadings should be perfect and sound in every point, he shall not have judgment, as was held in Southwell and Dauntrey's Case, in 2 Eliz. But he held the replication to be good, and so the plaintiff should have judgment.

Quod CLENCH, J., concessit. Wherefore (absentibus ceteris), *Judgment for the plaintiff, nisi aliquod dicatur in contrario die Veneris proximo.*

And note, that it was moved by counsel for the defendant that the plaintiff's protestation in his replication was bad, because it was taken to the substance of the bar and he might take issue on it; and also because by his plea he confesses matter which is contrary to his protestation. And it was agreed by the court and not denied by the plaintiff's counsel. And Creisbrook's Case in the Commentaries, 276 b, was cited in proof of this. But since the defendant had demurred generally he lost the advantage he might have taken because of the imperfection of the protestation.

Et adjournatur.

The plaintiff seems to have discontinued at this point. A diligent search of the records has failed to discover an entry of judgment.

This report resembles that by Croke. The statement of facts differs slightly in form; the opinion as published in Croke's reports is nearly identical, except that the point of pleading is much abridged. Coke's statement of the case, on the other hand, is almost identical with the present one; but the opinion of the court, as he states it, is very different. He cites eleven authorities in the discussion, while upon this point, according to this report and Croke's, the court cited but one (see what Professor Gray says of Coke's responsibility for the multiplication of citations, 9 HARVARD LAW REVIEW, 38) These authorities he elaborately distin-

guishes. Truly, as Lord Holt said, "My Lord Coke has improved the case in his report of it." On the other hand he omitted all reference to the point of pleading. Both reporters omitted the argument of counsel.

The Court of King's Bench was divided at this time on questions arising out of the law of bailment, Gawdy and Clench (the judges whose *obiter* opinion is here given) being on one side, and Popham and Fenner on the other. Woodlife's Case, Moore, 462; Mosley *v.* Fosset, Moore, 543. The force of their *dictum* on the liability of a general bailee is weakened by this fact, and also by the fact that their *dictum* on the question of pleading is obviously incorrect.

If Southcott's Case was ever accepted by the bar, in the form in which Coke reported it, as law, it was overruled by the whole court in Coggs *v.* Bernard, 2 Ld. Raym. 1909 (1703). POWELL, J., said:

"Let us consider the reason of the case, for nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Ed. 4, 40 b, there is such an opinion by Danby [then at the bar]. The case in 3 H. 7, 4, was of a special bailment, so that that case cannot go very far in the matter. 6 H. 7, 12. There is such an opinion, by the by. And this is all the foundation of Southcote's Case." HOLT, C. J., said: "The case in 3 H. 7, 4, is but a sudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's case, heretofore, I was not so discerning as my brother POWYS tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered and digested that matter. . . . There is neither sufficient reason nor authority to support the opinion in Southcote's case."

From the time of Coggs *v.* Bernard Southcott's Case was forgotten, save for a brilliant discussion by Sir William Jones (Bailments, p. 41). He points out that the case arises on a declaration stating that the goods were to be safely kept, and that the opinion is given upon "such a delivery." "Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit which has occasioned so many reflections on the case itself: namely, 'that to keep and to keep safely are one and the same

thing.' . . . It must be allowed that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them."

Judge Holmes (The Common Law, p. 178), on the other hand, attempts to reinforce his scholarly discussion of the law of bailments by the citation of Southcott's Case. This seems to be the only citation of the case with approval since it was decided. See 11 HARVARD LAW REVIEW, 161.

J. H. Beale, Jr.